

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES GARLAND WATERS,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:14-CV-00170-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 13, 15. Attorney Jeffrey Schwab represents James Garland Waters (Plaintiff); Special Assistant United States Attorney Nicole Jabaily represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 18. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits (DIB) on June 23, 2011, alleging disability since February 1, 2011, due to lower back, neck, knees, emotional, and skin impairments. Tr. 178, 182. The application was

1 denied initially and upon reconsideration. Tr. 135-137, 140-141. Administrative
2 Law Judge (ALJ) R.J. Payne held a hearing on January 9, 2013, at which Plaintiff,
3 represented by counsel, and medical expert (ME) Arthur Brovender, M.D.,
4 testified. Tr. 51-95. The ALJ issued an unfavorable decision on February 28,
5 2013. Tr. 21-39. The Appeals Council denied review on April 4, 2014. Tr. 1-3.
6 The ALJ's February 28, 2013, decision became the final decision of the
7 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
8 405(g). Plaintiff filed this action for judicial review on June 3, 2014. ECF No. 1,
9 3.

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was 52 years old at alleged onset date. Tr. 169. Plaintiff completed
15 one year of college in 1977. Tr. 183. He reported that he stopped working because
16 of his condition on February 1, 2011. Tr. 182. Plaintiff had a prior application that
17 resulted in a closed period of eligibility from January 9, 2009, through January 3,
18 2011. Tr. 100. In this decision, the ALJ held that Plaintiff was capable of a full
19 range of light work as of January 3, 2011. Tr. 107. The prior ALJ decision was
20 appealed to the Appeals Council on June 8, 2011, but the closed period of benefits
21 was upheld. Tr. 23.

22 As for medical evidence, a review of the record shows that Plaintiff was
23 being treated by and had his care managed through Rodney Crabtree, M.D., at
24 Wenatchee Valley Clinic from May 2, 2011 to May 15, 2012. Tr. 203-244, 303-
25 304. Plaintiff was also seeing chiropractor, J. Brian Addleman, D.C., from January
26 4, 2011, to July 20, 2011, for his low back pain. Tr. 146-269. In May and August
27 of 2011, Plaintiff saw Orthopedic, Hank J. Vejvoda, M.D., who concluded that
28 surgery would not help with Plaintiff's back pain and prescribed physical therapy.

Tr. 275-277. Plaintiff attended 16 physical therapy sessions and discontinued treatment because “he felt he was not having good progress.” Tr. 290. From June 2, 2011, to January 30, 2013, Plaintiff was treated for his mental health impairments by Mauvia Sorensen, ARNP. Tr. 293-302, 306-316, 325, 331-340, 344.

At the hearing, Dr. Brovender testified that he agreed with the RFC provided by the DDS reviewing physician, Alnoor Virji, M.D. Tr. 58. Following the hearing, Plaintiff submitted medical records from his prior application to Dr. Brovender, who stated the records did not change his opinion. Tr. 60-61, 341-342.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ’s determination is conclusive.

1 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Commissioner has established a five-step sequential evaluation process
4 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*
5 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
6 proof rests upon claimants to establish a prima facie case of entitlement to
7 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once
8 claimants establish that physical or mental impairments prevent them from
9 engaging in their previous occupations. 20 C.F.R. § 404.1520(a)(4). If claimants
10 cannot do their past relevant work, the ALJ proceeds to step five, and the burden
11 shifts to the Commissioner to show that (1) the claimants can make an adjustment
12 to other work, and (2) specific jobs exist in the national economy which claimants
13 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
14 (2004). If claimants cannot make an adjustment to other work in the national
15 economy, a finding of “disabled” is made. 20 C.F.R. § 404.1520(a)(4)(v).

16 **ADMINISTRATIVE DECISION**

17 On February 28, 2013, the ALJ issued a decision finding Plaintiff was not
18 disabled as defined in the Social Security Act.

19 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
20 activity since February 1, 2011, the alleged date of onset. Tr. 25.

21 At step two, the ALJ determined Plaintiff had the following severe
22 impairments: degenerative joint disease of the lumbar spine; degenerative disc
23 disease of the cervical spine; left shoulder impingement syndrome; and obesity.
24 Tr. 25.

25 At step three, the ALJ found Plaintiff did not have an impairment or
26 combination of impairments that met or medically equaled the severity of one of
27 the listed impairments. Tr. 28.

28 At step four, the ALJ assessed Plaintiff’s residual function capacity (RFC)

1 and determined he could perform light exertional work with the following
2 limitations:

3 [H]e could occasionally lift or carry up to 20 pounds and frequently up
4 to 10 pounds; he could stand or walk for six hours in an eight hour day
5 and sit for six hours in an eight hour day; he could frequently climb
6 ramps or stairs, kneel, crouch, or crawl; he could occasionally stoop or
7 climb ladders, ropes, or scaffolds; he could occasionally reach overhead
8 with either upper extremity; and should avoid concentrated exposure to
extreme heat or cold, vibration, and hazards.

9 Tr. 29. The ALJ concluded that Plaintiff was able to perform his past relevant
10 work as a surveyor assistant. Tr. 34.

11 In the alternative to a step four denial, the ALJ also determined that,
12 considering Plaintiff's age, education, work experience and RFC, and based on the
13 Medical-Vocational Guidelines at 20 C.F.R. Part 404, Subpart P, Appendix 2, as a
14 framework, a finding of "not disabled" was appropriate. Tr. 35. The ALJ thus
15 concluded Plaintiff was not under a disability within the meaning of the Social
16 Security Act at any time from February 1, 2011, through the date of the ALJ's
17 decision, February 28, 2013. Tr. 36.

18 ISSUES

19 The question presented is whether substantial evidence supports the ALJ's
20 decision denying benefits and, if so, whether that decision is based on proper legal
21 standards. Plaintiff contends the ALJ erred by (1) failing to give proper weight to
22 the opinion of Plaintiff's chiropractor; (2) failing to properly consider Plaintiff's
23 testimony about the severity of his symptoms, (3) failing to fully and fairly develop
24 the record; (4) failing to make sufficient findings of facts to support his step four
25 determination; and (5) failing to meet his burden of proof at step five.

26 DISCUSSION

27 A. Chiropractor's Opinion

28 Plaintiff asserts that the ALJ failed to give proper weight to the opinion of

1 Dr. Addleman, a chiropractor. ECF No. 13 at 13-16. The ALJ gave Dr.
2 Addleman's opinion "little weight" for three reasons: (1) he was a non-accepted
3 medical source; (2) he was not familiar with the definition of "disability" contained
4 in the Social Security Act and regulations; and (3) "he was basing his opinion off
5 the claimant's report that he had been receiving disability for a prior closed period
6 claim and had recently ended his receipt of benefits." Tr. 31.

7 On January 4, 2011, Dr. Addleman noted that Plaintiff was on disability. Tr.
8 246. On January 28, 2011, following an acute exacerbation of low back
9 symptoms, Dr. Addleman stated "I have advised no work and talked to the patient
10 about disability relative to his current and past problems ie knees and
11 musculoskeletal." Tr. 251. Six months later, on June 28, 2011, Dr. Addleman
12 concluded that Plaintiff had "suffered an acute exacerbation of his chronic
13 subluxation complex" due to stress and states, "[i]n my opinion, the patient's status
14 is permanent causing disability relating to his musculoskeletal complaints. I do
15 not, and cannot see him returning to gainful employment on a partial, modified or
16 full time basis." Tr. 268.

17 Section 404.1513(a) of Title 20 C.F.R. requires evidence "from accepted
18 medical sources to establish whether you have a medically determinable
19 impairment." "Accepted medical sources" include licensed physicians, licensed
20 psychologists, licensed optometrists, licensed podiatrists, and qualified speech-
21 language pathologists. *Id.* "Other sources" include nurse practitioners, physicians'
22 assistants, therapists, teachers, social workers, spouses and other non-medical
23 sources. 20 C.F.R. § 404.1513(d). While the ALJ is required to consider
24 observations by "other sources" as to how an impairment affects a claimant's
25 ability to work, *Id.*, the ALJ can disregard evidence from an "other source," by
26 setting forth reasons "that are germane to each witness." *Nguyen v. Chater*, 100
27 F.3d 1462, 1467 (9th Cir. 1996).

28 Dr. Addleman is a chiropractor. 20 C.F.R. § 404.1513(d)(1) specifically

1 lists chiropractors as a medical source that is considered an “other source.”
2 Therefore, the ALJ is only required to provide reasons that are germane to Dr.
3 Addleman to reject his opinion.

4 The ALJ’s first reason for rejecting Dr. Addleman’s opinion, that he is not
5 an acceptable medical source, is not, by itself, a sufficient reason. The ALJ is
6 required to consider evidence supplied by lay witnesses. 20 C.F.R. § 404.1513(d).
7 Therefore, the fact that someone is a lay witness alone is not a sufficient reason to
8 reject the lay witness’ opinion.

9 Second, the ALJ rejected Dr. Addleman’s opinion because he was not
10 familiar with the definition of “disability” contained in the Social Security Act and
11 regulations. Tr. 31. Pursuant to 20 C.F.R. § 404.1527(c), a medical source’s
12 understanding of Social Security’s disability programs and the evidentiary
13 requirements is a potential factor to be considered when weighing the opinion of an
14 acceptable medical source. S.S.R. 06-03p has extended the factors set forth in 20
15 C.F.R. § 404.1527(c) to weighing the opinions from “other sources.”¹ Thus, a lack
16 of understanding of the Social Security Act and regulations is an acceptable reason
17 to reject an opinion from an “other source.” Nonetheless, the record is void of any
18 reference to Dr. Addleman’s understanding of Social Security Act and regulations.
19 It appears the ALJ assumed Dr. Addleman lacked an understanding.

20 Defendant argues that this case is similar to *Orteza v. Shalala*, 50 F.3d 748
21 (9th Cir. 1995) in urging the Court to conclude that based Dr. Addleman’s use of
22

23 ¹S.S.R. 06-03p extends the factors set forth in 20 C.F.R. § 404.1527(d) to
24 opinions from “other sources,” but at the time of the S.S.R.’s publication, August
25 9, 2006, 20 C.F.R. § 404.1527(d) read as the present’s 20 C.F.R. § 404.1527(c).
26 See 20 C.F.R. § 404.1527 (2006) (Effective August 1, 2006, to November 11,
27 2010).
28

1 the word “disabled” it is clear he did not mean the term as it is defined by the
2 Social Security Act and regulations. ECF No. 15 at 6. The Court in *Orteza*,
3 concluded that because the doctor made no reference to the technical requirements
4 of sedentary work as defined in 20 C.F.R. § 404.1567, it could not conclude that
5 his limitation to a “sedentary type job” equaled a limitation to “sedentary work.”
6 *Orteza*, 50 F.3d at 750. In this case, Dr. Addleman concluded that Plaintiff’s
7 impairment was “permanent causing disability relating to his musculoskeletal
8 complaints.” Tr. 268. He further opined that he could not “see [Plaintiff] returning
9 to gainful employment on a partial, modified or full time basis.” *Id.* The inability
10 to sustain work activity is consistent with a finding of disability under the Social
11 Security Act and regulations. 42 U.S.C. § 423(d)(1) (the term disability means an
12 “inability to engage in any substantial gainful activity by reason of any medically
13 determinable physical or mental impairment which can be expected to result in
14 death or which has lasted or can be expected to last for a continuous period of not
15 less than 12 months); 20 C.F.R. § 404.1512(a) (in evaluating whether a claimant
16 satisfies the disability criteria, the Commissioner must evaluate a claimant’s
17 “ability to work on a sustained basis”); S.S.R. 96–8p (in evaluating a claimant’s
18 RFC, the ALJ’s assessment must consider an individual’s ability to perform
19 “work-related physical and mental activities in a work setting on a regular and
20 continuing basis. A ‘regular and continuing basis’ means 8 hours a day, for 5 days
21 a week, or an equivalent work schedule”). Therefore, this case is distinguishable
22 from *Orteza* as Dr. Addleman’s opinion regarding “disability” is consistent with
23 Social Security’s technical definition of “disability.” As such, the ALJ’s second
24 reason is not supported by substantial evidence and, therefore, not a sufficient
25 reason to reject Dr. Addleman’s “other source” opinion.

26 Third, the ALJ concluded that Dr. Addleman based his opinion “off the
27 claimant’s report that he had been receiving disability for a prior closed period
28 claim and had recently ended his receipt of benefits.” Tr. 31. The record is

1 sufficient to support the conclusion that Dr. Addleman relied on claimant's report
2 of past disability benefits. Dr. Addleman states in his records that he discussed
3 both the prior and current disability applications with Plaintiff. Tr. 251.
4 Therefore, the ALJ's third and final reason for rejecting Dr. Addleman's opinion is
5 sufficient.

6 The ALJ need only supply a reason that is germane to Dr. Addleman.
7 *Nguyen*, 100 F.3d at 1467. As such, the ALJ did not error in rejecting Dr.
8 Addleman's opinion.

9 **B. Credibility**

10 Plaintiff contests the ALJ's adverse credibility determination in this case.
11 ECF No. 13 at 16-22.

12 It is generally the province of the ALJ to make credibility determinations,
13 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
14 cogent reasons, *Rashad*, 903 F.2d at 1231. Absent affirmative evidence of
15 malingering, the ALJ's reasons for rejecting the claimant's testimony must be
16 "specific, clear and convincing." *Smolen*, 80 F.3d at 1281; *Lester*, 81 F.3d at 834
17 "General findings are insufficient: rather the ALJ must identify what testimony is
18 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
19 F.3d at 834.

20 The ALJ found Plaintiff less than fully credible concerning the intensity,
21 persistence, and limiting effects of his symptoms. Tr. 30. The ALJ reasoned that
22 Plaintiff was less than fully credible because (1) the objective medical evidence did
23 not support the level of limitation claimed, (2) Plaintiff made inconsistent
24 statements regarding his ability to work, and (3) Plaintiff's activities of daily living
25 were inconsistent with the alleged severity of his symptoms. Tr. 30, 33-34.

26 **1. Objective Medical Evidence**

27 The ALJ first concluded that the objective medical evidence did not support
28 the level of limitation claimed by Plaintiff. Tr. 30.

1 An ALJ may cite inconsistencies between a claimant's testimony and the
2 objective medical evidence in discounting the claimant's testimony. *Bray v.*
3 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But, the ALJ
4 may not discredit the claimant's testimony as to subjective symptoms merely
5 because they are unsupported by objective evidence. *Lester*, 81 F.3d at 834.

6 In his decision, the ALJ summarized Plaintiff's statements regarding his
7 functional ability. Tr. 30. The ALJ then summarized the objective medical
8 evidence in the record. Tr. 30-33. Finally, the ALJ concluded that Plaintiff's
9 "testimony at the hearing did not always reflect what the medical evidence
10 indicate[d]." Tr. 34.

11 Plaintiff asserts that the ALJ's conclusion that the objective medical
12 evidence was inconsistent with Plaintiff's testimony is vague. ECF No. 13 at 19.
13 The Court finds that the ALJ could have been more specific in stating what
14 testimony was considered inconsistent with what medical evidence, but that any
15 error resulting from this lack of specificity is harmless because there are an
16 additional two reasons that ALJ found Plaintiff to be less than fully credible that
17 meet the clear and convincing standard. *See Carmickle v. Comm'r Soc. Sec.*
18 *Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008) (upholding adverse credibility finding
19 where the ALJ provided four reasons to discredit claimant, two of which were
20 invalid); *Batson*, 359 F.3d at 1197 (affirming credibility finding where one of
21 several reasons was unsupported by the record).

22 **2. Inconsistent Statements**

23 The ALJ's second reason for finding Plaintiff less than fully credible, that
24 his statements regarding his performance of work are inconsistent, is a clear and
25 convincing reason to reject his testimony.

26 In determining credibility, an ALJ may engage in ordinary techniques of
27 credibility evaluation, such as considering a claimant's reputation for truthfulness
28 and inconsistencies in a claimant's testimony. *Burch v. Barnhart*, 400 F.3d 676,

1 680 (9th Cir. 2005). In his decision, the ALJ specifically set forth Plaintiff's
2 statements regarding his ability to work:

3 The claimant testified he could not return to work and indicated he
4 tried to work for his brother at the family orchard, but could not (Ex.
5 B13E). ...

6 However, in July 2011, the claimant told Mauvia Sorensen, ARNP,
7 that he *was* "currently working for his family's orchard" (Ex. B3F, p.
8 2). In September 2011, the claimant reported he was *trying to work*
9 "as much as he" could at his brother's orchard, *supervising* the
10 laborers, and being productive (Ex. B6F, p. 3). He stated he could
11 only tolerate this for a "few minutes" (Ex. B6F, p. 3). Yet, in
12 November 2011, the claimant reported to Ms. Sorensen "*he has been*
13 *able to work* for his brother on his orchard which has helped him
14 make a little money and make him feel productive" (Ex. B6F, p. 2).

13 Tr. 33.

14 A review of the record shows that on July 20, 2011, Ms. Sorensen listed
15 Plaintiff's occupation as "[c]urrently working for his family's orchard." Tr. 271.
16 On September 9, 2011, Plaintiff told Ms. Sorensen that "he is trying to work as
17 much as he can and his brother[']s orchard walking around and supervising the
18 laborers. The patient reports that he can only tolerate this for a few minutes, but it
19 helps him feel like he is doing something productive." Tr. 295. On November 3,
20 2011, Plaintiff reported to Ms. Sorensen that "he has been able to work for his
21 brother on his orchard which has helped him make a little money and feel
22 productive." Tr. 294.

23 At the January 9, 2013, hearing, Plaintiff testified that his brother offered
24 him a job at his pear orchard performing "the two simplest tasks he could have me
25 do, I couldn't do it. My back would seize up and I couldn't walk on that uneven
26 ground because of my knees. And it just didn't work out." Tr. 82. He further
27 testified that he performed this job for about an hour and a half on one day. *Id.* He
28 then went on to testify that he tried grafting trees in July of 2011 and that did not

1 work due to the activity requiring him to bend his back at a forty-five degree angle.
2 Tr. 82-83. Then he testified that during the 2011 harvest, he tried completing
3 orchard bends, but again was not able to because of his back being at a forty-five
4 degree angle during the activity. *Id.*

5 Plaintiff challenges the ALJ's determination that his statements were
6 inconsistent by arguing that the November 2011 statement makes no reference to the
7 duration of the work and is therefore not contradictory to past statements. ECF No.
8 13 at 18. However, there does appear to be a difference in the quantity of work
9 performed between the statements to Ms. Sorenson and Plaintiff's testimony. As
10 such, there is evidence to support the ALJ's determination. If the evidence is
11 susceptible to more than one rational interpretation, the Court may not substitute its
12 judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. Therefore, the Court will
13 not disturb this determination. The ALJ's finding that Plaintiff made inconsistent
14 statements regarding his ability to work is a clear and convincing reason supported
15 by substantial evidence to find Plaintiff less than fully credible.

16 **3. Activities of Daily Living**

17 The ALJ's third reason for finding Plaintiff less than fully credible, that
18 Plaintiff's activities were inconsistent with his alleged limitations, Tr. 34, is a
19 specific, clear, and convincing reason to undermine Plaintiff's credibility.

20 A claimant's daily activities may support an adverse credibility finding if (1)
21 the claimant's activities contradict his other testimony, or (2) "the claimant is able
22 to spend a substantial part of his day engaged in pursuits involving performance of
23 physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d
24 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

25 In his decision, the ALJ summarized Plaintiff's statements regarding the
26 severity of his symptoms, including the inability to walk more than 45 minutes at a
27 time, the limited mobility in his back, the inability to wash dishes or perform
28 household chores, the need to change positions every 20-30 minutes, the inability

1 to climb stairs, and the difficulty getting out of a chair. Tr. 30. The ALJ then
2 noted that Plaintiff reported being able to walk five miles a day, go to the gym
3 multiple times a week, drive around town, drive to Seattle, prepare to travel to
4 Mexico, and spend hours at a friend's bar. Tr. 34. Additionally, the ALJ noted
5 that no one in the record encouraged Plaintiff to decrease physical activity; instead,
6 he was encouraged to increase physical activity. *Id.* The ALJ concluded that "the
7 frequency and severity of the physical symptoms the claimant testified to [were]
8 not supported by the record evidence including his own admissions to various
9 providers throughout the record." *Id.* This finding is fully supported by the
10 evidence of record.

11 The ALJ provided specifics for determining that the reported ADLs
12 contradicted his testimony; therefore, this is a clear and convincing reason to reject
13 claimant's testimony.

14 Based on the forgoing, the Court finds the ALJ provided clear and
15 convincing reasons for finding Plaintiff less than fully credible in this case.

16 **C. Develop the Record**

17 Plaintiff asserts that the ALJ failed to develop the record by not sending
18 Plaintiff for a psychological consultative examination before concluding Plaintiff
19 did not have a severe mental health impairment. ECF No. 13 at 22.

20 The ALJ has "a special duty to fully and fairly develop the record and to
21 assure that the claimant's interests are considered." *Smolen*, 80 F.3d at 1288. This
22 duty exists even when the claimant is represented by counsel. *Brown v. Heckler*,
23 713 F.2d 441, 443 (9th Cir. 1983). Despite the duty to develop the record, it
24 remains the claimant's burden to prove that he is disabled. 42 U.S.C. §
25 423(d)(5)(A). "An ALJ's duty to develop the record . . . is triggered only when
26 there is ambiguous evidence or when the record is inadequate to allow for proper
27 evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-460 (9th Cir.
28 2001). "One of the means available to an ALJ to supplement an inadequate

1 medical record is to order a consultative examination.” *Reed v. Massanari*, 270
2 F.3d 838, 841 (9th Cir. 2001).

3 At step two, the ALJ determined that Plaintiff did not have a severe mental
4 health impairment. Tr. 26-28. In forming this determination, the ALJ discussed
5 Plaintiff’s mental health records. Tr. 26-28. The ALJ made repeated references to
6 the medical records, including records from Nurse Practitioner Sorensen from
7 Wenatchee Behavioral Medicine and Plaintiff’s treating physician, Dr. Crabtree.

8 Plaintiff does not allege that the evidence is ambiguous. He only alleges that
9 the evidence is insufficient to come to a determination. ECF No. 13 at 22.

10 Considering the extent of the ALJ’s discussion of Plaintiff’s mental health
11 impairments and the records in the file, especially those from Wenatchee
12 Behavioral Medicine dated from July 20, 2011, to January 30, 2013, the ALJ had
13 sufficient evidence to come to a conclusion regarding Plaintiff’s mental health
14 impairments. *Fair*, 885 F.2d at 603 (“Where, as here, the ALJ has made specific
15 findings justifying a decision to disbelieve an allegation . . . and those findings are
16 supported by substantial evidence in the record, our role is not to second-guess that
17 decision”). Therefore, the ALJ’s duty to develop the record was not triggered.
18 There was no error in the ALJ’s decision that Plaintiff’s mental health impairment
19 was not severe without first sending him to a consultative examination.

20 **D. Step Four**

21 Plaintiff asserts that the ALJ erred at step four by (1) failing to form an
22 accurate RFC, specifically noting that the ALJ failed to include the limitations set
23 forth by Dr. Addleman, (2) failing to identify the specific demands of Plaintiff’s
24 past relevant work, and (3) failing to properly compare the specific demands of
25 Plaintiff’s past relevant work with the RFC. ECF No. 13 at 23-25.

26 At Step Four, the claimant has the burden of showing that he can no longer
27 perform his past relevant work. *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir.
28 2001); *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). “To determine

whether a claimant has the [RFC] to perform his past relevant work, the [ALJ] must ascertain the demands of the claimant's former work and then compare the demands with his present capacity." *Villa v. Heckler*, 797 F.2d 794, 797–798 (9th Cir. 1986); *Marcia v. Sullivan*, 900 F.2d 172, 177 n.6 (9th Cir. 1990). A claimant is not disabled under the Social Security Act if he can perform (1) a specific prior job as "actually performed," or (2) the same kind of work as it is "generally performed" in the national economy. *Pinto*, 249 F.3d at 845 (citing S.S.R. 82–61²). A claimant's ability to do either is sufficient to deny the claim at step four, and the ALJ is not required to address both. *Pinto*, 249 F.3d at 845. A claimant's testimony and/or a properly completed vocational report are appropriate sources for defining past work as actually performed. *Pinto*, 249 F.3d at 845; S.S.R. 82–41; S.S.R. 82–61.

In the decision, the ALJ set forth an RFC based on the medical evidence in the file. Tr. 29. As discussed above, the ALJ gave a proper reason for rejecting the opinion of Dr. Addleman. Then, the ALJ summarized the demands of Plaintiff's work as a Survey Party Chief from 2006 to 2009. Tr. 34–35. Then, the ALJ stated that "[i]n comparing the claimant's residual functional capacity with the physical and mental demands of this work, the undersigned finds that the claimant is able to perform it as actually performed." Tr. 35. A review of Plaintiff's Work

²Although they do not carry the "force of law," Social Security Rulings are binding on ALJs. *See* 20 C.F.R. § 402.35(b) (1); *Bray*, 554 F.3d at 1224. Such rulings "reflect the official interpretation of the [Social Security Administration] and are entitled to some deference as long as they are consistent with the Social Security Act and regulations." *Molina v. Astrue*, 674 F.3d 1104, 1113 n.5 (9th Cir. 2012) (citations and internal quotation marks omitted); *see also Heckler v. Edwards*, 465 U.S. 870, 873 n.3 (1984) (discussing weight and function of Social Security Rulings).

1 History Report shows he worked as a Survey Party Chief from 2006 to 2009. Tr.
2 217. During this time he did not exceed the RFC set forth by the ALJ: he climbed
3 half an hour a day; he stooped one hour a day; and he did zero reaching. Tr. 219.
4 The ALJ made all the necessary factual findings at step four. His determination is
5 free from legal error.

6 Plaintiff alleges that the ALJ failed to consider the exposure to extreme
7 temperatures as a requirement of his past relevant work as a Survey Party Chief.
8 ECF No. 13 at 25. The ALJ made his determination based on a properly
9 completed work history report. The burden of proof at step four is with Plaintiff,
10 and Plaintiff did not present evidence of extreme temperatures being a part of his
11 Survey Party Chief position. Therefore, this challenge is without merit.

12 **E. Step Five**

13 The ALJ made an alternative determination at step five based on the
14 Medical-Vocational Rules as a framework. Tr. 35-36. Plaintiff asserts that the
15 ALJ erred at step five by not calling a vocational expert (VE) to testify about jobs
16 that exist in the national economy and thus failed to meet his burden of proof. ECF
17 No. 13 at 25-26.

18 The Ninth Circuit has held that when the ALJ determines that the claimant
19 can perform his past relevant work, it unnecessary for the ALJ to call a VE at step
20 five. *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996). If a claimant is found to
21 be able to do his past relevant work, this is no need to proceed to step five. *Id.*
22 Furthermore, with a step four determination that a claimant can perform past
23 relevant work, which is supported by substantial evidence and free of error, any
24 error made at step five would be considered harmless error. *See Tommasetti v.*
25 *Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is harmless when “it is clear
26 from the record that the . . . error was inconsequential to the ultimate nondisability
27 determination”).

28 Therefore the ALJ did not error in his alternative step five determination.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is supported by substantial evidence and free of harmful legal error.

Accordingly, **IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant** and the file shall be **CLOSED**.

DATED January 19, 2016.



A handwritten signature in black ink, appearing to read "M", is positioned above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE